

ANNE LIM KENG SEE

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v.

THE NEWS STRAITS TIME PRESS (M) BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR

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AZMEL MAAMOR J

[CIVIL SUIT NO: S6-23-48-2001]

15 MARCH 2003

TORT: Defamation - Libel - Libel in a newspaper - Proper parties to be sued - Whether proper to sue newspaper in which libel appeared - Whether newspaper a legal entity that can sue and be sued - Whether liability confined to proprietor, editor, printer, publisher and vendor of newspaper - Default judgment entered against newspaper - Whether null and void - Whether should be set aside *ex debito justitiae* - Whether publisher of newspaper has locus standi to file proceedings on behalf of newspaper

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TORT: Defamation - Libel - Libel in a newspaper - Publication/ advertisement of notice of substituted service of bankruptcy notice - Bankruptcy notice allegedly fallacious - Whether newspaper can rely on defence of qualified privilege - Whether there was malice in publication - Whether publication falls within ambit of s. 12 Defamation Act 1957 - Whether proper to summarily dispose of libel action under O. 14A Rules of the High Court 1980

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CIVIL PROCEDURE: Parties - Proper parties to be sued - Libel in a newspaper - Whether proper to sue newspaper in which libel appeared - Whether newspaper a legal entity that can sue and be sued - Whether liability confined to proprietor, editor, printer, publisher and vendor of newspaper - Default judgment entered against newspaper - Whether null and void - Whether should be set aside *ex debito justitiae* - Whether publisher of newspaper has locus standi to file proceedings on behalf of newspaper

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The plaintiff brought an action for libel against the 1st and 2nd defendants herein (The New Straits Times Press (M) Bhd and *The Malay Mail* respectively) and, thereafter, obtained judgment in default of appearance against the 2nd defendant. The 1st defendant then applied to set aside the default judgment entered against the 2nd defendant and the deputy registrar

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- a* allowed the application. The instant proceedings before the court were: (i) the plaintiff's appeal to the judge-in-chambers against the decision of the deputy registrar setting aside the default judgment; and (ii) the 1st defendant's application to determine, as a preliminary issue of law, whether it would be entitled, as the publisher of the 2nd defendant, to rely on the defence of qualified privilege for newspapers under s. 12 of the Defamation Act 1957 ('the Act').
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Held:

- c* [1a] The decision of the deputy registrar to set aside the judgment in default of appearance entered against the 2nd defendant was correct. The 2nd defendant was merely one of the newspapers published by the 1st defendant; it was not a legal entity and was not registered with either the Registrar of Companies or the Registrar of Businesses. Liability in respect of a libel appearing in a newspaper extends to the author of the libel as well as to the proprietor, editor, printer, publisher and vendor of the newspaper but **not** to the newspaper itself. Consequently, the 2nd defendant should not have been sued as a party, and the default judgment entered against it, being null and void, should be set aside *ex debito justitiae*. (p 568 a-h)
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- e* [1b] Contrary to the plaintiff's assertions, the 1st defendant, being the owner and publisher of the 2nd defendant, had the *locus standi* to file the application to have the default judgment entered against the 2nd defendant set aside. Moreover, the 2nd defendant, not being a legal entity, can neither sue nor be sued. The 1st defendant, on the other hand, had the power to bring any proceedings on behalf of itself or of its assets. (p 569 e-f)
- f*
- [2] The was no malice on the part of the 1st defendant in advertising/publishing the notice of substituted service for the bankruptcy notice in respect of the plaintiff. It did so upon the instructions of the solicitors of the plaintiff's judgment creditor, as was ordered by the High Court. The publication of the said notice of substituted service in the 2nd defendant thus fell squarely within the four corners of s. 12(1) of the Act. Consequently, the 1st defendant, as the publisher of the 2nd defendant, would be entitled to rely upon the defence of qualified privilege for newspapers under s. 12 of the Act. The 1st
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defendant's application was also consistent with the spirit of the new O. 14A of the Rules of the High Court 1980 respecting the summary disposal of cases on points of law. (pp 572 e-g & 573 a-c) a

[Plaintiff's appeal dismissed; 1st defendant's application allowed.]

Case(s) referred to: b
Syarikat Joo Seng & Anor v. Habib Bank Ltd [1986] 2 MLJ 129 (refd)

Legislation referred to:
Defamation Act 1957, ss. 2, 12(1), sch. part 1 s. 3
Rules of the High Court 1980, O. 14A, O. 33 r. 2 c

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, p 19, para 38
Supreme Court Practice, p 1531, para 81/1/7
Supreme Court Practice, 1999, vol 1, para 13/9/6

For the plaintiff - En Arunachalam (Josephine Robert); M/s Arun & Co d
For the defendants - Lorraine Cheah (Mohd Izral Khairy); M/s Shearn Delamore & Co

Reported by Gan Peng Chiang

JUDGMENT e

Azmel Maamor J:

In this case the plaintiff brought an action for libel against the two defendants for publishing words defamatory of the plaintiff. As regards the 2nd defendant the plaintiff, on 19 September 2001, had obtained judgment in default of appearance. f

Under encl. 16 the 1st defendant made an application to set aside the judgment in default against the 2nd defendant. The application was heard by deputy registrar who had earlier given the default judgment. After having heard arguments from both counsel the learned deputy registrar allowed the judgment in default to be set aside. Hence the appeal by the plaintiff to the judge in chambers against the decision of the learned deputy registrar. g

1. Plaintiffs Appeal – Enclosure 32

After having heard the submissions from counsel for both parties I arrived at the decision that the plaintiff's appeal be dismissed as I was of the view that the learned deputy registrar had arrived at the correct decision. And I had no reason to disturb it. My reasons are as follows: h

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a It was contended by the counsel for the 1st defendant that the 2nd defendant was not a legal entity registered with either the Registrar of Companies or the Registrar of Businesses. The Malay Mail was one of the many newspaper products produced by the 1st defendant. In the circumstances of this case I concluded that the 2nd defendant is not a legal entity.

b In cases of defamation, involving defamation by a newspaper, the parties responsible or answerable for the matters that have been published in the newspaper are the author, proprietor, editor, printer, publisher and vendor of the newspaper concerned but not the newspaper itself. This position is clearly stated in *Halsbury's Laws of England*, 4th edn at p. 19 (para 38):

c 38. JOINT AND SEVERAL LIABILITY. Every person who takes part in or procures the publication of a libel is *prima facie* liable jointly and severally for all damage caused by it. Thus, if a libel appears in a newspaper, the author of the libel and the proprietor, editor, printer, publisher and vendor of the newspaper are *prima facie* jointly and severally
d liable.

And at p. 1531, para 81/1/7 of the Supreme Court Practice, it is stated:

The name of a newspaper is not usually a firm name under which the proprietors carry on the business and they should not be sued.

e Because the 2nd defendant, The Malay Mail, is not a legal entity it should not have been sued as a party. As such the order made against it should be set aside *ex debito justitiae*. In para 13/9/6 O. 13 the Supreme Court Practice 1999 Vol. 1 it is stated:

f JUDGMENT SET ASIDE BY THE COURT OF ITS OWN MOTION – If it comes to the knowledge of the Court that it has entered judgment in default of acknowledgement of service against a man who at the material time was dead or a company which at such time was dissolved or non-existent according to the law of its country or origin the Court is bound after hearing the parties interested, of its own motion to set the judgment
g aside. Such judgment is null and void.

In my view, the 2nd defendant, the Malay Mail, comes within such category of non-existent entity. As such the judgment entered against the 2nd defendant earlier was null and void. On this matter I need only refer to the Supreme Court case of *Syarikat Joo Seng & Anor v. Habib Bank Ltd.* [1986] 2 MLJ 129. In this case the respondent had brought a writ action against the appellants. The appellants entered a conditional appearance and

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applied to strike off the writ and the statement of claim. The application was dismissed on 4 June 1984 and notice of appeal was filed on 29 June 1984. However on 22 June 1984 the respondent without obtaining leave of the court entered a judgment in default of defence against the appellants. The appellants applied to set aside the default judgment and this was refused by the High Court. The appellants appealed to the Supreme Court. In allowing the appeal the Supreme Court ruled:

In this case the respondents should have complied with Order 19 rule 7(1) of the Rules of the High Court by applying to the Court or a judge for leave to enter judgment against the appellants. This they failed to do and therefore the judgment was an irregular judgment obtained in direct contravention of Order 19 rule 7(1). The Appellants are therefore entitled *ex debito justitiae* to have the default judgment set aside.

In the instant case, the counsel for the plaintiff contended that the 1st defendant who made this application to set aside the judgment in default had no *locus standi* to bring this application. The plaintiff argued that since the default judgment was made against the 2nd defendant the application to set it aside should be made by the 2nd defendant.

In my view there were no merits in the plaintiff's contention. The 2nd defendant is not a legal entity. It cannot be sued and therefore has no capacity to sue. As such the 2nd defendant does not have the legal capacity to bring any action in court including the application to set aside the default order. Since the 1st defendant is the owner of the 2nd defendant, it has the power to bring any action concerning itself as well as its own assets, including the 2nd defendant. In the light of the relationship between the 1st defendant and the 2nd defendant and having regard to the legal capacity of the 2nd defendant it was quite clear to me that any action concerning the 2nd defendant should be brought by the 1st defendant and not the 2nd defendant. Therefore the 1st defendant has the *locus standi* to make this application.

In the light of the reasons as I have stated above I arrived at the decision that the plaintiff's appeal against the decision of the learned deputy registrar be dismissed with costs.

a 2. Application By The 1st Defendant – Enclosure 21

Under encl. 21 the 1st defendant applied for leave pursuant to O. 33 r. 2 of the Rules of the High Court 1980 to decide the following preliminary issues of law:

- b** 1. Whether the 1st Defendant is entitled to rely upon the defence of qualified privilege pursuant to s. 12 of the Defamation Act 1957 as it is the publisher of the newspaper known as “The Malay Mail” and had published the Bankruptcy Notice pursuant to an Order of the High Court in Malaya.

c It was submitted by the 1st defendant that if this court makes a finding that the 1st defendant is indeed entitled to rely upon s. 12 of the Defamation Act 1957 then the entire suit can be disposed off at this stage without the need for this matter to proceed to trial.

d The plaintiff objected to the 1st defendant’s application. In the light of such objection I requested counsel for both parties to give their written submissions in respect of this application. It may, at this juncture, be pertinent for me to state very briefly the circumstances that led the plaintiff to bring the action for defamation against the 1st and 2nd defendants. The plaintiff’s claim against the two defendants arose out of the publication in the Malay Mail of a “Notis Penyampaian Ganti”. On 22 January 2001 the Malay Mail published and advertised the said Notis Penyampaian Ganti as follows:

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN DAGANG)

f DALAM PERKARA KEBANKRAPAN NO: D2-29-4162 TAHUN
1999

Berkenaan : Anne Lim Keng See
(No. K/P : A 0149182) ... Penghutang Penghakiman

g Ex-Parte : MBF Finance Berhad ... Pemiutang Penghakiman

NOTIS PENYAMPAIAN GANTI

Kepada:

h Anne Lim Keng See,
11, Jalan 13/46,
Bandar Tasik Selatan,
57000 Kuala Lumpur.

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AMBIL PERHATIAN bahawa suatu tindakan telah dimulakan terhadap kamu di Mahkamah Tinggi Kuala Lumpur No. Kebankrapan D2-29-4162-1999 oleh MBF Finance Berhad yang beralamat di Tingkat 2, Wisma MBF, Jalan Pudu, 55100 Kuala Lumpur dan Mahkamah Yang Mulia ini telah memerintahkan bahawa Notis Kebankrapan ini diserahkan kepada kamu secara Penyampaian Ganti dengan menampalkan sesalinan Perintah dan sesalinan Notis Kebankrapan di Papan Notis Mahkamah Tinggi Kuala Lumpur, di alamat terakhir Penghutang Penghakiman di 11, Jalan 13/46, Bandar Tasik Selatan, 57000 Kuala Lumpur serta melalui bentuk iklan dalam suratkhbar tempatan dan penyampaian tersebut adalah sempurna dan cukup terhadap Penghutang Penghakiman selepas (7) hari dari tarikh penyampaian dan pengiklanan.

Notis Kebankrapan ini boleh diperiksa oleh kamu di atas permohonan di Mahkamah Tinggi Kuala Lumpur.

Bertarikh pada 16hb September, 2000
Penolong Kanan Pendaftar,
Mahkamah Tinggi,
Kuala Lumpur.

Notis Penyampaian Ganti ini difailkan oleh Tetuan T.K. Ooi, Loo & Partners yang beralamat di Blok A, Tingkat 10, Wisma Yakin, Jalan Masjid India, 50100 Kuala Lumpur, peguamcara bagi Pemiutang Penghakiman.

(Ruj Kami: MBF-PU/LOC/24-93).

The 1st defendant did not dispute having published the Notice of Substituted Service on 22 January 2001 in respect of Kuala Lumpur High Court Bankruptcy Notice No: D2-29-462-99. The 1st defendant, however, contended that it received instruction to advertise the said publication from Messrs. T.K. Ooi, Loo & Partners, the Solicitors for the Judgement Creditor MBF Finance Berhad as ordered by the High Court. The 1st defendant stressed that it had no malice in advertising the said publication.

It was submitted by the 1st defendant that the publication was through a newspaper which had only advertised an order of the Kuala Lumpur High Court and as such should not be liable to the plaintiff for defamation for the publication since such act falls squarely within the ambit of s. 12 of the Defamation Act 1957.

a Section 12(1) of the Defamation Act 1957 states:

12(1). Subject to the provisions of this section, the publication in a newspaper of any such report or other matters as mentioned in Part I of the Schedule to this Act shall be privileged unless the publication is proved to be made with malice.

b And s. 3 of Part I of the Schedule states:

3. A notice, advertisement or report issued or published by or on the authority of any court within Malaysia or any Judge or officer of the court or by any public officer or receiver or trustee acting in accordance with the requirements of any written law.

c The word “newspaper” is defined under s. 2 of the Defamation Act as follows:

d ‘newspaper’ means any paper containing public news or observations thereon or consisting wholly or mainly of advertisements which is printed for sale and is published in Malaysia either periodically or in parts or numbers at intervals not exceeding thirty-six days;

e The plaintiff, however, contended that the advertisement published by the defendants was untrue. The plaintiff claimed that she was not indebted to the judgment creditor. Because the advertisement was not true, the defendants therefore had committed libel and as such the defendants could not rely upon s. 12 of the Defamation Act as a defence. I was unable to agree with the plaintiff’s argument. For the purpose of a defence under s. 12 of the Defamation Act, all that the 1st defendant needed to prove was

f that there was actually an order of the court asking such advertisement to be published in the newspaper. This had not been disputed. The non-truthfulness of the plaintiff’s debt to the judgment creditor would be a matter for the plaintiff to state at the Bankruptcy Court as a ground to set aside the Bankruptcy Notice or Order. The only ground that the 1st defendant would not be allowed to invoke s. 12 as a defence is if the publication

g was done with malice. On the facts of this case there was no evidence of malice whatsoever by the 1st defendant in advertising the publication. It genuinely had no knowledge that the plaintiff’s indebtedness to the judgment creditor was untrue.

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After having considered the whole circumstances of this case including the submissions by counsel from both parties I decided to allow the 1st defendant's application. As a matter of fact the 1st defendant's application was very much in conformity with the spirit of newly included O. 14A of the High Court Rules 1980 which authorises the court to dispose off summarily appropriate cases based on affidavit evidence instead of going through lengthy hearing by calling witnesses.

Having regard to the whole circumstances of this case I was fully satisfied that this case could be disposed off by first determining the preliminary legal issue as raised by the 1st defendant in this application. And I was also satisfied that the 1st defendant was entitled to rely upon the defence of qualified privilege by virtue of s. 12 of the Defamation Act 1957. I therefore allowed the 1st defendant's application with costs.

There was, however, one final matter which I thought for the avoidance of doubt, should also be mentioned here. It arose from the fact that in the year 2001 my daughter, Azliza Baizura, was working as a legal assistant, with the defendant's solicitors, Tetuan Shearn Delamore & Co. In view of that on 29 October 2001 I have asked the counsel for the plaintiff to enquire from his client whether the plaintiff would have any objection for me to continue to hear this case. And by a letter dated 12 December 2001 the counsel for the plaintiff indicated that his client did not want me to continue and requested that the case be further heard by another judge. However my daughter had resigned from the services of Tetuan Shearn Delamore & Co. with effect from 31 December 2001. This fact was confirmed by the counsel for the defendants. In the light of such circumstances I was of the view that there was no longer any good reason for this case to be heard by another judge. It was after my daughter had left Tetuan Shearn Delamore & Co. that the two matters in this case came up for hearing before me, namely, encl. 21 was first fixed for hearing on 10 January 2002 while encl. 32 was first fixed for hearing on 21 February 2002. It is to be noted that only on 28 August 2002 the counsel for the plaintiff decided to raise the issue that I should not have continued to hear this case because my daughter was working with Tetuan Shearn Delamore & Co. I must emphasise that at the time when I heard the matters under encl. 21 and encl. 32 I had full knowledge that my daughter was no longer working with Tetuan Shearn Delamore & Co. And I also wish to emphasise here that in considering the two applications I had no prejudice against any of the counsel representing the plaintiff and the defendants. I arrived at my decisions based purely on

a the merits of the two matters. It really took me as a surprise and I felt very sad that the plaintiff's counsel chose to raise this issue at such a late stage and not before the commencement of the hearing of the two matters at which time whatever doubts, if any, could have been dealt with and cleared.

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